Supreme Court, U. S.
FILED
MAY 10 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1569

JOSEPH E. ABEL, JR., LARRY NEAL WHITTINGTON, JOHN FREDERICK STEUBER, JR., ALFRED EPHREM LAVOIE and JAMES GLENN GIBSON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ALBERT J. FEIGEN, ESQ.
1101 Seventeenth Street, N. W.
Washington, D. C. 20036

PARKHURST, LA HURD & PURDY, P.A
1177 Southeast Third Avenue
Fort Lauderdale, Florida 33316

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX TO PETITION

	Page
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Statement of the Facts	4
Reasons for Granting the Writ	7
Conclusion	14

CITATION OF AUTHORITY

CASES:

Carlton v. *Estelle*, 480 F.2d 759 (5th Cir. 1973) 8
Chapman v. *United States*, 365 U.S. 610 (1961) 13, 15
Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) 7, 8
Frazier v. *Cupp*, 394 U.S. 731 (1969) 13
Honig v. *United States*, 208 F.2d 916 (8th Cir. 1953) .. 10
Jones v. *United States*, 362 U.S. 257 (1960) 13
Katz v. *United States*, 389 U.S. 347 (1967) 8, 12, 13
Maxwell v. *Stephens*, 348 F.2d 892 (8th Cir. 1965) ... 13-14
Olmstead v. *United States*, 277 U.S. 438 (1927) 14
Roberts v. *United States*, 332 F.2d 892 (8th Cir. 1964) 14
Simmons v. *United States*, 390 U.S. 377 (1968) 13
Stoner v. *California*, 376 U.S. 483 (1964) 13

Page

United States v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951).. 13

United States v. *Bobisink*, 415 F. Supp. 1334 (D. Mass. 1976) 7, 11

United States v. *Eldridge*, 302 F.2d 463 (1962) 14

United States v. *Emery*, 541 F.2d 887 (1st Cir. 1976).. 15

United States v. *Frazier*, 538 F.2d 1322 (8th Cir. 1976) 7

United States v. *Holmes*, 521 F.2d 859 (5th Cir. 1975), aff'd en banc by an evenly divided court, 537 F.2d 227 (5th Cir. 1976) 7

United States v. *Hufford*, 539 F.2d 32 (9th Cir. 1976).. 7

United States v. *Lefkowitz*, 285 U.S. 452 (1932) 10

United States v. *Maitlock*, 415 U.S. 164 (1974) 13

United States v. *Martyniuk*, 395 F. Supp. 42 (D. Ore. 1975) 7

United States v. *Pretzinger*, 542 F.2d 517 (9th Cir. 1976) 7, 15

Wong Sun v. *United States*, 371 U.S. 44 (1963) 8

OTHER AUTHORITY:

Federal Rule of Criminal Procedure 41 15

Title III, Federal Electronic Surveillance Statute, 18 USC Sec. 2510-2520 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No.

JOSEPH E. ABEL, JR., LARRY NEAL WHITTINGTON, JOHN FREDERICK STEUBER, JR., ALFRED EPHREM LAVOIE and JAMES GLENN GIBSON, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, JOSEPH E. ABEL, JR., LARRY NEAL WHITTINGTON, JOHN FREDERICK STEUBER, JR., ALFRED EPHREM LAVOIE and JAMES GLENN GIBSON, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, affirming the judgments and sentences of the United States District Court for the Southern District of Florida.

OPINION BELOW

The decision of the United States Court of Appeals, Fifth Circuit, affirming the judgments and sentences of the trial court herein sought to be reviewed appears at Page 1a of Petitioners' Appendix hereto (references to said Appendix shall be denoted by the page number with letter "a" following). The decision was rendered March 11, 1977, after which Petitioners filed Suggestion for Rehearing en banc and Petition for Rehearing. The Petitions for Rehearing were denied on April 11, 1977, and Petitioners filed Motions for Stay or Recall of the Mandate pending the filing of this Petition for Writ of Certiorari.

JURISDICTION

This Petition for Writ of Certiorari to review the decision of the United States Court of Appeals, Fifth Circuit, is filed pursuant to the provisions of 28 USC Sec 1254(1).

QUESTIONS PRESENTED

1. Whether the placing of an electronic surveillance device upon an aircraft by a government agent without a warrant or prior judicial authorization or a showing of exigent circumstances constituted an illegal search which resulted in the illegal seizure of evidence used to convict the petitioners.

2. Whether the co-owner of an aircraft can consent to the installation of an electronic surveillance device therein which results in a search thereof while the aircraft is in the exclusive possession and control of a lessee thereof.

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment

Amendment IV, Searches and Seizures.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Petitioners were charged by indictment filed on December 11, 1975, in one count with conspiracy to import quantities of marijuana in violation of Title 21, United States Code, Sec. 963. (3a) That portion of the indictment charging Petitioners with possession of a controlled substance with intent to distribute was subsequently dismissed.

Following arraignments at which all defendants pled not guilty, Petitioners herein then filed Motions to Suppress evidence which was seized as the result of the installation of an electronic surveillance device commonly referred to as a "beeper" within or upon a DC-3 aircraft in which all of the Petitioners were arrested. Prior to the hearing on the Motions to Suppress, counsel for the Government and the defendants executed a stipulation that the placing of the beeper on the aircraft led the Government to discover evidence which was the subject matter of the prosecution and providing that if the search resulting from installation of the beeper was invalid then all physical evidence seized as a direct or derivative result thereof within the State of Florida would be suppressed.

(6a) The Motions to Suppress were heard prior to trial and the trial court on April 22, 1976, denied all Motions. (8a)

The case was tried before a jury and resulted in a verdict of guilty as to each of the Petitioners herein, whereupon the court adjudicated said Petitioners guilty and subsequently sentenced each to imprisonment.

Defendants appealed their convictions and sentences to the United States Court of Appeals, Fifth Circuit, which rendered its opinion under date of March 11, 1977, affirming the judgments of the United States District Court for the Southern District of Florida. (1a)

STATEMENT OF THE FACTS

Petitioners were arrested by federal and local agents during the early morning hours of July 3, 1975, when their DC-3 aircraft landed at Lakeland, Florida. Sometime prior to July 2, 1975, an electronic tracking device commonly referred to as a "beeper" was installed by federal agents upon the aircraft occupied by Petitioners. Testimony elicited at the Motions to Suppress established that Government agents were able to track and follow the aircraft solely by virtue of the electronic emissions from this beeper. While the aircraft could not be visually observed due to darkness, Government agents were able to follow its flight path by means of electronic receivers upon their aircraft which were tuned to the frequency of the beeper installed upon the DC-3 aircraft. This electronic tracking ultimately led the agents to Lakeland and the arrest of Petitioners. At the time of Petitioners' arrest, certain fragments of vegetable material were obtained from the DC-3 aircraft which were later introduced into evidence as marijuana.

All Petitioners filed Motions to Suppress prior to trial and after arraignment. Prior to the hearing thereon, it was stipulated between counsel for the Government and these Petitioners that the sole means by which this evidence was seized was by use of the beeper aboard the DC-3 aircraft, which had been installed with the knowledge and alleged consent of the president of the corporate owner of the aircraft. It was further stipulated that if this consent was legally and voluntarily given then the evidence was admissible; if not, then the evidence would be suppressed.

A corporation known as CIM Associates, Inc., was the owner of the DC-3 aircraft. Its president was Henry Maierhoffer, who testified that he owned all of its capital stock. One Earl Jordan, referred to in the indictment as "a deceased unindicted co-conspirator" was allowed free use of the DC-3 by some business arrangements between he and Maierhoffer. Petitioner Abel leased the aircraft from Jordan at a cost of $100.00 per hour plus fuel.

At the hearing on the Motions to Suppress, Maierhoffer testified he had been approached approximately two years previously and asked if he had objection to federal agents installing a beeper on the DC-3 in question, at which time he advised he had none. Sometime in June of 1975, he was again contacted by federal agents and asked if he objected at that time to the installation of a beeper on the aircraft, at which time he again replied in the negative. He admitted that he had previously been arrested and investigated for

drug offenses, that at the time he met with the federal agents in June of 1975, he was having difficulties with customs officials regarding use of some of his aircraft, and that he neither knew the nature of the electronic device nor why it was to be used and was not apprised of when or where it would be installed or for what period of time. In fact, he testified he had no personal knowledge of whether the beeper had ever been installed on the aircraft.

Petitioner Abel testified that he had leased the aircraft from Earl Jordan to obtain a "type" rating as pilot pursuant to an agreement whereby Abel was to pay Jordan $100.00 per hour, plus fuel, for every hour he flew the aircraft as calculated by an hour meter, a device similar to an odometer, which was installed in the aircraft. He testified that he was supposed to have received a written lease from Maierhoffer and that he was not engaged in any type of business venture with either Maierhoffer, Jordan or CIM Associates.

On April 22, 1976, the trial court entered its written Order denying the Motions to Suppress. (8a)

Thereafter, the case was tried to a jury, during which the subject evidence was introduced, and at the conclusion of which all of these Petitioners were convicted of the charge as set forth in the indictment. Motions for New Trial were denied, and, following sentencing, Petitioners appealed. Their convictions were affirmed by the Fifth Circuit Court of Appeals on March 11, 1977. Motions for Rehearing and Rehearing en banc were denied by that court on April 11, 1977.

REASONS FOR GRANTING THE WRIT

1. The Placing by Government Agents of an Electronic Surveillance Device Upon an Aircraft Without First Securing a Warrant or Prior Judicial Authorization and Without Any Showing of Exigent Circumstances Constituted an Illegal Search Which Resulted in the Illegal Seizure of Evidence Used To Convict Petitioners.

The installation of an electronic tracking device on a motor vehicle has been held by the Fifth Circuit Court of Appeals to be a search within the meaning of the Fourth Amendment. *United States* v. *Holmes,* 521 F.2d 859 (5th Cir. 1975), aff'd en banc by an evenly divided court, 537 F.2d 227 (5th Cir. 1976). However, the circuits are divided upon this issue. The Ninth Circuit has held that the attachment of an electronic locator device to a vehicle moving about on public thoroughfares does not infringe upon any reasonable expectation of privacy and, therefore, does not constitute a search. *United States* v. *Pretzinger,* 542 F.2d 517 (9th Cir., 1976); *United States* v. *Hufford,* 539 F.2d 32 (9th Cir., 1976); accord: *United States* v. *Frazier,* 538 F.2d 1322 (8th Cir., 1976); cf., *United States* v. *Holmes, supra; United States* v. *Bobisink,* 415 F. Supp. 1334 (D. Mass. 1976); *United States* v. *Martyniuk,* 395 F. Supp. 42 (D. Ore. 1975). At the hearing on the motions to suppress, no federal agent testified. The record is absolutely devoid of any suggestion of exigent circumstances which would authorize installation of the beeper without prior court approval. Thus, under the holding in *Holmes, supra,* the attachment of the beeper *per se* violated the requirements for warrantless searches as set forth in *Coolidge* v. *New Hampshire,* 403 U.S. 443 (1971); and see *United States* v. *Martynuik,* 395 F. Supp. 42 (D. Ore. 1975). These legal tenets are particularly applicable in a case

such as this case, where a warrant could easily have been obtained but was not and no evidence was adduced to satisfy the burden of proving requisite elements justifying a warrantless search. Thus, under its circumstances, this case falls within the general rule that a search conducted without the prior approval of a magistrate is unreasonable, despite a subsequent assessment of circumstances which may reveal probable cause. *Coolidge* v. *New Hampshire, supra; Katz* v. *United States,* 389 U.S. 347 (1967); *Carlton* v. *Estelle,* 480 F.2d 759 (5th Cir. 1973).

Due to the nature of the device used, it is submitted that protection of the Fourth Amendment rights of Petitioners required submission of the matter to an impartial magistrate prior to its use. See *Katz* v. *United States, supra.* Since all of the evidence used to convict the Petitioners here emanated from the attachment of the beeper in the first instance, then all of the evidence should be excluded. *Wong Sun* v. *United States,* 371 U.S. 44 (1963).

Aware of this, the Government based its case upon the alleged voluntary consent to the search given by the president and sole stockholder of the corporate owner of the aircraft, Mr. Maierhoffer.

2. The Co-owner of an Aircraft Cannot Give Legally Valid and Binding Consent to the Installation of an Electronic Surveillance Device Upon Such Aircraft Which Results in Search Thereof While the Aircraft Is in the Exclusive Possession and Control of a Non-consenting Third-party Lessee.

At the hearing on the motions to suppress, Mr. Maierhoffer testified that he was president and sole stockholder of CIM Associates, Inc., which held documentary title to the DC-3 aircraft in question. In

response to questions posed by the court, he testified about his business relationship with the deceased Earl Jordan as follows:

> The Court. Jordan had an interest in the aircraft other than simply having advanced you some money, is that correct?
> Witness. Yes, sir.
> The Court. And also in your business?
> Witness. Yes, sir.
> The Court. So you and Jordan were jointly operating that business in some sort of partnership?
> Witness. Yes, sir. (Tr. Vol. 1, p. 54)

Maierhoffer testified that he had been approached by government agents approximately two years prior to July of 1975, at which time he had been asked by the agents for permission to install an electronic beeper upon the aircraft in question and he replied in the affirmative. Sometime in June of 1975 he met with drug enforcement agents and was again asked if they could attach an electronic beeper to the aircraft. His recollection of the conversation at that time was simply that he met with the agents and during a general conversation about how his aircraft business was going, they asked him if they could attach an electronic beeper to the aircraft:

> Q. Did they ever say anything specifically about any alleged smuggling or any other importation of any goods into this country or illegal purposes?
> A. Not that I can remember.
> Q. All that they wanted to do was to put a device on a large cargo plane and that is, as far as you know, what was going on, and no names were mentioned as to any illegal illicit activity?
> A. Not that I can remember.
>
> (Tr. Vol. 1, p. 78)

He further testified that he had no personal knowledge whether the device was ever attached to the aircraft, or whether the beeper about which he had been asked two years before had been attached or was in fact still upon the aircraft. Although it was well established that there may be a search and seizure without warrant predicated upon the consent of the accused or person being investigated, the consent must not only be voluntary and not as a matter of probable compulsion from the demands or domination of authority, but also must be kept within the bounds of the actual consent. *Honig* v. *United States*, 208 F.2d 916 (8th Cir. 1953). Thus, the search became an on-going and virtually limitless general, exploratory search which has long been proscribed by our courts. See *United States* v. *Lefkowitz*, 285 U.S. 452 (1932).

Another point which was developed during examination of the witness Maierhoffer during that hearing was that Federal Aviation Administration Regulations prohibit the operation of any portable electronic device on a commercial aircraft unless a determination is made by the operator of the aircraft that such device will not cause interference with the navigation or communication system of the aircraft on which it is to be used. (11a) Upon being apprised of this during examination, Mr. Maierhoffer stated that he would not have consented to the installation of the electronic device as requested by government agents had he been aware of this regulation.

Assuming the consent was voluntary and the scope of the search was clear, the critical issue which must be determined is whether Maierhoffer could give consent to search which would be legally binding upon a third-party lessee who had exclusive control over the

aircraft when the beeper was being used to secure the evidence upon which the Petitioners were convicted. At the motion to suppress, Petitioner Abel testified about the arrangement he had for use of the aircraft as follows:

> Q. Now, directing your attention to July 2 of 1975, did you have an occasion to use the aircraft on that day?
>
> A. Yes.
>
> Q. And what was your arrangement that was existing at that time for the use of the aircraft, including any considerations that you were to pay for the aircraft?
>
> A. I was to pay $100.00 an hour for every hour we flew and an hour meter was on the airplane. It is like a regular clock that keeps track of time like a speedometer on a car. I would pay Mr. Jordan $100.00 an hour and then I would furnish the fuel.
>
> Q. Had you, in fact, made such payments to Mr. Jordan for the use of the aircraft?
>
> A. Yes, sir.
>
> Q. Now, on July 2, 1975, can you tell me, with respect to the use of the aircraft on that day or on July 3, 1975, were you engaged in any type of business or venture, or was the object of the trip—did the object of the trip have anything to do with any business involving Hank Maierhoffer or CIM Associates?
>
> A. No, sir.
>
> (Addendum to Transcript, pp. 6-7)

A recent case close in point to the issues *sub judice* is *United States* v. *Bobisink*, 415 F. Supp. 1334 (D. Mass. 1976). In that case, drug enforcement agents were informed by the manager of a chemical company that one of the defendants had placed an order for substantial amounts of various chemicals which could be

used to manufacture a controlled substance. With the consent of the manufacturer, agents placed a beeper inside a package of chemicals ordered by one of the defendants. Thereafter, agents observed the defendants pick up the packages of chemicals. including the one with the beeper inside. At that time the agents also attached a beeper to the undercarriage of the transporting vehicle. By virtue of the emitted signals from these beepers, agents were able to follow defendants to a location where the chemicals were relocated within a house. After further surveillance, the agents secured search warrants and seized the evidence which was the basis of the prosecution. Defendants jointly moved to suppress the evidence on grounds that the evidence presented to the magistrate and relied upon him in his finding of probable cause to issue the warrant was obtained by use of the beepers without the authority of a warrant. In granting the defendants' motion to suppress, the court held that the facts of the instant case were governed by the principles enunciated in *Katz* v. *United States*, 389 U.S. 347 (1967), and went on to state:

> Initially it should be noted that, insofar as it is relevant,[4] the kinds of areas involved here do come under the umbrella of the Fourth Amendment. Absent special circumstances, a person's automobile is not subject to a warrantless search. This court holds that the same is true of property purchased by an individual. A citizen is entitled to assume that property he buys does not contain an electronic spy.[5]

[5] This holding is not altered by the fact that Doe & Ingalls gave its permission to place the beeper in the package. They cannot waive the purchaser's Fourth Amendment rights, any more than the telephone company could have sanctioned the installation of the recording device in *Katz*. 415 F. Supp. at 1338, and n. 5., *Ibid.*

Fourth Amendment rights are personal rights. *Simmons* v. *United States*, 390 U.S. 377 (1968). The Fourth Amendment protects people and not places. *Katz* v. *United States*, 389 U.S. 347 (1967). As such, they may be asserted and waived only by the person possessing the rights or by a third party having common authority over or some special relationship to the premises to be searched. *United States* v. *Maitlock*, 415 U.S. 164 (1974). The term "common authority" is not to be implied from a mere property interest which a third party has in the property or premises searched; the authority which justifies third party consent does not and should not rest upon the law of property with its attendant refinements and historical distinctions. *Chapman* v. *United States*, 365 U.S. 610 (1961); *Jones* v. *United States*, 362 U.S. 257 (1960). In *Chapman, supra*, a landlord's consent to search leased premises in the absence of the lessee was held invalid. Likewise, a warrantless search of a hotel room in the absence of the occupant predicated upon the consent of the hotel clerk has been held invalid. *Stoner* v. *California*, 376 U.S. 483 (1964). And it has been held that an employer cannot consent to search of an employee's desk when the employee has exclusive right to its use. See *United States* v. *Blok*, 188 F.2d 1019 (D.C. Cir. 1951). The basic ingredients which have evolved in those cases upholding third-party consent are possession and control over the object or premises to be searched. Thus, it has been held that consent may be given by a defendant's paramour where they held themselves to be husband and wife and shared a bedroom, *United States* v. *Maitlock*, 415 U.S. 164 (1974); by the joint user of a duffel bag, *Frazier* v. *Cupp*, 394 U.S. 731 (1969); a defendant's parents, *Maxwell* v.

Stephens, 348 F.2d 892 (8th Cir. 1965); a defendant's spouse, *Roberts* v. *United States*, 332 F.2d 892 (8th Cir. 1964); and by a gratutious bailee of an automobile in lawful possession, *United States* v. *Eldridge*, 302 F.2d 463 (1962).

An examination of the facts in the case *sub judice* reveal none of the elements authorizing valid warrantless search predicated upon legally cognizable consent as enumerated in the cases above. The testimony here established that Maierhoffer, as president and sole stockholder of CIM Associates, Inc., was engaged in a joint venture or partnership with the deceased Earl Jordan regarding use of the aircraft in question, and that Defendant Abel had rented the aircraft from Jordan on an hourly basis. Abel's use of the aircraft certainly did not involve any business of CIM Associates, Inc., Maierhoffer or Jordan. Thus, while Maierhoffer may well have been in a position to give consent to search for Jordan, there was no such relationship between himself and the occupants of the aircraft at the time in question whereby legally recognized consent could have been given.

CONCLUSION

In its final analysis, there appears to be no significant distinction between the problem initially encountered in *Olmstead* v. *United States*, 277 U.S. 438 (1927), which accepted wire tapping as a "search" within the meaning of the Fourth Amendment and the monitoring of beeper signals as a search in Fourth Amendment terms. It is submitted that a warrant should be required for the installation of an electronic surveillance device whenever one would be necessary for a conventional search. This approach would guarantee that proper balance between individual rights and the government by submitting the issue to a neutral magistrate and not leaving that judgment to law enforcement officers alone, a procedure long recognized by this court as best calculated to preserve the integrity of Fourth Amendment protections. *Chapman* v. *United States*, 365 U.S. 610 (1961). The initial installation of such a device can occur without a warrant where certain well-defined exemptions apply, as where exigent circumstances would prevent recourse to a court, and similar principles could appy to the monitoring of the device. However, it is respectfully submitted that where ample time is available, or where monitoring which began under exigent circumstances becomes on-going, a warrant is feasible and should be required. Warrants have been issued under Federal Rule of Criminal Procedure 41 for installation of beepers, as was the case in *United States* v. *Pretzinger*, 542 F.2d 517 (9th Cir. 1976), where such a warrant was secured for installation of a beeper within an aircraft. Further, authorization for monitoring coud be incorporated into such orders, which could define the scope or duration of use. The use of Federal Rule of Criminal Procedure 41 for beeper warrants is probably made necessary by the fact that Title III of the Federal Electronic Surveillance Statute, 18 USC Sec. 2510-2520, does not apply to beepers. *United States* v. *Emery*, 541 F.2d 887 (1st Cir. 1976).

Additionally, this practice would avoid the thwarting of legal process by the mere presence of governmental authority seeking consent to search, a circumstance too easily capable of subtle coercion and abuse of individual freedoms.

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ALBERT J. FEIGEN, ESQ.
1101 Seventeenth Street, N. W.
Washington, D. C. 20036
Telephone No. 202-296-1925

ARTHUR B. PARKHURST
PARKHURST, LA HURD & PURDY, P.A
1177 Southeast Third Avenue
Fort Lauderdale, Florida 33316
Telephone No. 305-525-3441

Attorneys for Petitioners

APPENDIX

INDEX TO APPENDIX

Decision of the United States Court of Appeals, Fifth Circuit 1a

Indictment 3a

Additional Stipulation re: Motion to Suppress 6a

Order Denying Motion to Suppress 8a

Federal Aviation Administration, Title 14 CFR § 91.19 11a

UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

JOSEPH E. ABEL, SR., LARRY NEAL WHITTINGTON, JAMES GLENN GIBSON, ALFRED EPHREM LAVOIE and JOHN FREDERICK STEUBER, JR., *Defendants-Appellants.*

No. 76-2819

March 11, 1977

Appeals from the United States District Court for the Southern District of Florida.

Before JONES, COLEMAN and TJOFLAT, *Circuit Judges.*

JONES, *Circuit Judge*:

C.I.M. Associates, Inc., was the owner of a DC-3 aircraft. Henry Maierhoffer was its president and executive officer and owned all of its capital stock. Earl Jordan had the use of the aircraft through an ownership or other interest. The appellant, Abel, had used the aircraft several times pursuant to an arrangement with Jordan. Agents of the Drug Enforcement Agency suspected that the aircraft was being used in the smuggling of contraband and asked Maierhoffer for permission to install an electronic tracking device, known as a beeper, on the plane. Consent was given and the beeper was affixed to the aircraft. Earl Jordan was informed by Maierhoffer of the installation of the beeper. Sometime later the aircraft took off on a nighttime flight from Fort Lauderdale, Florida. A customs aircraft, guided by the beeper, followed. The DC-3 went first to an airfield near Freeport in Grand Bahama for a short stop, then to an airfield at Palatka, Florida, where another brief stop was made. The end of the trip was Lakeland, Florida, where the plane was searched by the agents and fragments of marijuana were found. The occupants of the plane, appellants here, were arrested. After an indictment for conspiracy to import marijuana the appellants filed a motion to suppress the contraband material found on the aircraft on the ground that the

tracking by the beeper and the search which disclosed the marijuana constituted an unlawful search and seizure.

The United States Attorney was apparently convinced that electronic surveillance by using a beeper was an unlawful search and so he stipulated with appellants' counsel that the beeper led to the discovery of the contraband, that if the "beeper search" was invalid the resulting evidence should be suppressed, "that the only issue the government raises as an exception to the requirement of a search warrant as to the beeper search is whether or not there was a legal valid consent given to make the beeper search by Hank Maierhoffer," and it was further stipulated "that if the Court finds the beeper search was pursuant to a valid legal consent given by Hank Maierhoffer then all contraband seized in the State of Florida as a direct or derivative result of that beeper search shall be admissible subject to all other legal objections and the right of appeal from an adverse ruling."

It was urged that the appellant Abel had some informal arrangement with Earl Jordan[1] which gave Abel some possessory or proprietary right in the DC-3 which rendered the installation and use of the beeper and the resulting search unlawful and invalid as to him and the other appellants. The district court, upon the evidence submitted, rejected this contention and held that because of the consent of Maierhoffer the installation of the beeper and its use in tracking the plane were legal and valid. The motion to suppress was denied. Conviction of the appellants followed. Whether the district court correctly denied the motion to suppress is the only question before this Court on appeal.

The stipulation, the evidence and the applicable legal principles required the decision made by the district court. Its judgment is *AFFIRMED.*

---

[1] The indictment refers to Earl Jordan as "a deceased unindicted co-conspirator."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. FL 75-122-CR-CF
21 USC § 963
M/S 5 years—$15,000
Plus special parole
term 2 years

UNITED STATES OF AMERICA

v.

JOSEPH E. ABEL, SR., GORDON LEE HAAS, ROGER DE CAMP, MARTIN CARL HAAS, THOMAS CLINTON MARTIN, THOMAS RAY MARTIN, ROBERT OLINSKI, MICHAEL GUTHRIE, LARRY NEAL WHITTINGTON, JOHN FREDERICK STEUBER, JR., JOHN HENRY JORDAN, JAMES GLENN GIBSON, DWIGHT SIMPSON BURKE, WALLACE HAROLD MILLER

Indictment

The Grand Jury charges that:

COUNT I

Commencing at a time unknown to the Grand Jury and continuing until on or about August 15, 1975, at Broward County, in the Southern District of Florida, the Bahama Islands, and other places, the defendants,

JOSEPH E. ABEL, SR.
GORDON LEE HAAS
ROGER DE CAMP
MARTIN CARL HAAS
THOMAS CLINTON MARTIN
THOMAS RAY MARTIN
ROBERT OLINSKI
MICHAEL GUTHRIE
LARRY NEAL WHITTINGTON
JOHN FREDERICK STEUBER, JR.

ALFRED EPHREM LAVOIE
JOHN HENRY JORDAN (SS) 12/11/75
JAMES GLENN GIBSON
DWIGHT SIMPSON BURKE
WALLACE HAROLD MILLER

did knowingly and intentionally combine, conspire, confederate, and agree with each other; and with Earl Wayne Jordan, (SS) 12/11/75 a deceased unindicted co-conspirator; and with diverse other persons presently to the Grand Jury unknown; to import quantities of marijuana, a Schedule I nonnarcotic controlled substance, into the United States from a place outside thereof, and also to possess with the intent to distribute quantities of marijuana.

In furtherance of and in order to conceal the existence of the conspiracy, the defendants did commit the following overt acts:

OVERT ACTS

1. On or about May 10, 1975, Ben Russell had a conversation with Earl Wayne Jordan (SS) 12/11/75 at Freeport, Grand Bahama Islands.

2. On or about June 13, 1975, Ben Russell met with Martin Haas, Gordon Haas, Robert Olinski, Michael Guthrie and Roger De Camp at Freeport, Grand Bahama Islands.

3. On or about June 15, 1975, Ben Russell met with Thomas Clinton Martin and Thomas Ray Martin at Deep Water Cay, Grand Bahama Islands.

4. On or about July 2, 1975, a DC-3 aircraft departed Fort Lauderdale International Airport, Broward County with Joseph E. Abel, Sr., Alfred Ephrem Lavoie, (SS) 12/11/75 Larry Neal Whittington, and James Glenn Gibson aboard.

5. On or about July 3, 1975, Joseph E. Abel, Sr., Alfred Ephrem Lavoie, Larry Neal Whittington, James Glenn

Gibson, and John Frederick Steuber, Jr. were passengers aboard a DC-3 aircraft which arrived at Lakeland, Florida.

All in violation of Title 21, United States Code, Section 963.

A TRUE BILL

/s/ STEPHEN SQUIRE
Stephen Squire
Foreman

ROBERT W. RUST
United States Attorney

By: /s/ R. JEROME SANFORD
R. Jerome Sanford
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(Caption Omitted In Printing)

Additional Stipulation Re Motion To Suppress

1

It is stipulated between the Government and Counsel for the Defendants that the placing of the beeper on the DC-3 aircraft led the Government to discover physical evidence consisting of contraband in the nature of marijuana seized in the State of Florida on July 3, 1975, and any other physical evidence seized in the State of Florida including the trucks (two) and U-Haul trailer seized at the Kay Larkin Airport in Putnam County, Florida, as well as the contents thereof and any other evidence seized as a result of the beeper.

2

It is further stipulated that if the beeper search is invalid that all physical evidence seized as a direct or derivative result of said beeper search within the State of Florida should be suppressed as to those defendants the Court finds has standing to challenge same.

3

It is further stipulated that the only issue the Government raises as an exception to the requirement of a search warrant as to the beeper search is whether or not there was a legal valid consent given to make the beeper search by Hank Meyerhoffer.

4

It is stipulated that if the Court finds the beeper search was pursuant to a valid legal consent given by Hank Meyerhoffer then all contraband seized in the State of Florida as a direct or derivative result of that beeper

search shall be admissible subject to all other legal objections and the right of appeal from an adverse ruling.

5

Notwithstanding the foregoing stipulation, the defendants contend the warrantless search and seizure of the two trucks and trailer at Kay Larkin Airport in Putnam County, Florida, is invalid and any evidence seized as a direct or indirect result of this search should be suppressed subject to any legal objections or right of appeal from an adverse ruling.

Done this 22nd day of April, 1976.

Respectfully submitted,

ROBERT W. RUST
Unted States Attorney

By: /s/ DONALD L. FERGUSON
Donald L. Ferguson
Assistant United States Attorney

/s/ RICHARD BARREST
Richard Barrest, Esquire

/s/ LAWRENCE BERRIN
Lawrence Berrin, Esquire

/s/ WILL DICKEY
Will Dickey, Esquire

/s/ RONALD GAFFNEY
Ronald Gaffney, Esquire

/s/ THOMAS CAZEL
Thomas Cazel, Esquire

/s/ HAROLD F. KEEFE
Harold F. Keefe, Esquire

/s/ PHILIP CARLTON
Philip Carlton, Esquire

(Caption Omitted In Printing)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Order

The defendants seek to suppress evidence obtained directly and indirectly through the placing of an electronic tracking device aboard a DC-3 aircraft. The government has conceded that those defendants who were aboard the aircraft have standing on these motions to challenge the placing of that electronic tracking device on board the aircraft.

CIM Associates, Inc., a corporate entity, was the owner of record of the airplane. Henry Maierhoffer was the owner of all of the capital stock of that corporation and was its President/Executive Officer, although he had entered into some sort of undocumented arrangement with Earl Jordan whereby they shared in the revenues derived from the operaton of the aircraft and at some later date Jordan was to receive shares of stock in the company.

There is evidence and the Court finds that Earl Jordan and the defendant Abel were closely associated in some sort of business; and that both Earl Jordan and Abel had the use of the aircraft continuously on a most informal basis.

There is testimony and the Court finds that the electronic device, which has been referred to during the hearing as a beeper, was installed upon the aircraft by a Drug Enforcement Agent with the knowledge and consent of Maierhoffer, who testified that he fully advised Earl Jordan about the presence of the beeper on the aircraft. Maierhoffer testified and the Court finds that Abel, who is some sort of business associate of Earl Jordan's, used the aircraft five or ten times before the incident in question, and that Abel's use of the aircraft was without a lease or other arrangements in writing. The Court finds and concludes that the beeper was attached to the aircraft durng the crit-

ical flight with the knowledge of Maierhoffer, which was voluntarily given. Having made this finding, coupled with the stipulation which has been entered into for and in behalf of the parties by all counsel, the Court finds and concludes that the issue of consent must be resolved against the defendants.

The only remaining issue with regard to the search and seizure in question is the validity of the search of the vehicles which were parked for several days and nights at the airport in Palataka, Florida, and which were within 50 feet of the aircraft which landed there (perhaps barely landed there would be a more accurate descrption). The vehicles were attended as the aircraft approached the landing field by the defendants John Jordan, Burke and Miller. As the aircraft in question approached the landing strip, the three defendants just mentioned became apprehensive and fled that location. There was a small quantity of marijuana discovered at the airport itself. The aircraft as it approached the airfield in question was being followed and surveilled by government aircraft, who had valid reason to believe the aircraft in question was involved in the importation of contraband.

The vehicles which were parked at the airport for several days and nights were left at long intervals unattended. Although in close proximity to the location of the landing aircraft, Jordan, Burke and Miller had fled and the vehicles were again unattended.

Since the defendants John Jordan, Burke and Miller were at the airport, they have standing to move to suppress the evidence developed from the beeper surveillance of the aircraft. However, the Court has heretofore resolved that issue against them.

In view of all the facts and circumstances, which include the presence of the vehicles within 50 feet of the location where the aircraft landed, the period that the vehicles

were in that location unattended, the fact that defendants Jordan, Burke and Miller had fled the location and left the vehicles unatended, and the presence of a small quantity of marijuana upon the landing field, all taken together, justify the seizure of the vehicles and inventorying of the contents thereof.

For the reasons stated, buttressed by the decison of the Supreme Court in *U.S.* v. *Maitlock,* 415 U.S. 174 (1974) and the decision of the Fifth Circuit Court of Appeals in *U.S.* v. *Holmes,* 521 F.2d 859 (1975), the motions of the defendants for suppression of the evidence in question are severally denied.

DONE and ORDERED at Miami, Florida, this 22 days of April, 1976.

/s/ CHARLES B. FULTON
Charles B. Fulton
Chief Judge

Federal Aviation Administration Title 14 CFR § 91.19

§ 91.19 *Portable electronic devices.*

(a) Except as provided in paragraph (b) of this section, no person may operate, nor may any operator or pilot in command of an aircraft allow the operation of, any portable electronic device on any of the following U.S. registered civil aircraft:

(1) Aircraft operated by an air carrier or commercial operator; or

(2) Any other aircraft while it is operated under IFR.

(b) Paragraph (a) of this section does not apply to:

(1) Portable voice recorders;

(2) Hearing aids;

(3) Heart pacemakers;

(4) Electric shavers; or

(5) Any other portable electronic device that the operator of the aircraft has determined will not cause interference with the navigation or communication system of the aircraft on which it is to be used.

(c) In the case of an aircraft operated by an air carrier or commercial operator, the determination required by paragraph (b)(5) of this section shall be made by the air carrier or commercial operator of the aircraft on which the particular device is to be used. In the case of other aircraft, the determination may be made by the pilot in command or other operator of the aircraft.